

**EXHIBIT N**



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2022 WL 2713278

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United States District Court, N.D.  
Iowa, Cedar Rapids Division.

Caitlin ROMBOUGH, on behalf of herself  
and others similarly situated, Plaintiff,

v.

ROBERT D. SMITH INSURANCE  
AGENCY, INC., and [State Farm Mutual  
Automobile Insurance Co.](#), Defendants.

No. 22-CV-15-CJW-MAR

|

Signed June 9, 2022

#### Attorneys and Law Firms

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### ORDER

[C.J. Williams](#), United States District Judge

#### I. INTRODUCTION

\*1 This matter is before the Court on defendants’ April 15, 2022, motion to dismiss plaintiff’s complaint. (Doc. 15). Plaintiff timely filed a resistance. (Doc. 18). Defendants timely filed a reply. (Doc. 20). For the following reasons, defendants’ (Doc. 15) motion is **granted** and this case is **dismissed with prejudice**.

#### II. BACKGROUND

Plaintiff’s claim arises out of defendants’ unwanted contact with her via telephone, both by voice message and text message. The following facts are from plaintiff’s complaint. (Doc. 1). Plaintiff is an Iowa resident. (*Id.*, at 2). Defendant Robert D. Smith Insurance Agency, Inc. is an Iowa insurance company, which assists customers in obtaining insurance from defendant State Farm Mutual Automobile Insurance Co. (“State Farm”). (*Id.*, at 2–3). Defendant State Farm is an Illinois insurance company. (*Id.*, at 3).

On October 25, 2021, defendants delivered a voice message and text message marketing State Farm insurance to plaintiff’s personal residential telephone number, which had been registered with the national do-not-call registry since April 7, 2017. (*Id.*, at 4–6). The message was intended for a recipient other than plaintiff. (*Id.*, at 6). Plaintiff did not request information from either defendant and is not, and never has been, a State Farm customer. (*Id.*). She suffered actual harm in the form of invasion of privacy, intrusion, and a private nuisance. (*Id.*).

On February 21, 2022, plaintiff brought suit against defendants, on behalf of herself and others similarly situated, (*Id.*, at 1), and alleges that class certification is proper for her claim. (*Id.*, at 7–10). Plaintiff asserts one claim, alleging that defendants violated the Telephone Consumer Protection Act (“TCPA”), [Title 47, United States Code, Section 227](#), by delivering messages as prohibited by [Title 47, Code of Federal Regulations, Section 64.1200\(c\)](#). (*Id.*, at 10–12).

On April 15, 2022, defendants filed their motion to dismiss under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). (Doc. 15).

#### III. APPLICABLE LAW

A complaint filed in federal court must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” [FED. R. CIV. P. 8\(a\)\(2\)](#). [Rule 8](#) does not require “detailed factual allegations.” [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 555 (2007). Nevertheless, it “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” [Ashcroft v. Iqbal](#), 556 U.S. 662, 678 (2009). A complaint that relies on “naked assertion[s]” devoid of “further factual enhancement,” “labels and conclusions,” or “a formulaic recitation of the elements of a cause of action will not do.” [Twombly](#), 550 U.S. at 555, 557.

Before filing an answer, a defendant may move to dismiss a complaint for “failure to state a claim upon which relief can be granted” under [Federal Rules of Civil Procedure 12\(b\)\(6\)](#). To survive a motion to dismiss under [Rule 12\(b\)\(6\)](#), “a complaint must contain sufficient factual matter ... to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (citation omitted). “[W]hen ruling on a defendant’s motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). The Court must also grant “all reasonable inferences” from the pleadings “in favor of the nonmoving party.” *Crumpley-Patterson v. Trinity Lutheran Hosp.*, 388 F.3d 588, 590 (8th Cir. 2004) (citation omitted). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. Plausibility is not equivalent to probability, but it is something “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* “The question ... is not whether [a plaintiff] might at some later stage be able to prove [its claims]; the question is whether [a plaintiff] has adequately asserted facts (as contrasted with naked legal conclusions) to support his claims.” *Whitney v. Guys, Inc.*, 700 F.3d 1118, 1129 (8th Cir. 2012).

#### IV. DISCUSSION

\*2 Plaintiff alleges that defendants violated [Section 227\(c\)\(5\)](#) by violating [Section 64.1200\(c\)](#), causing her harm. (Doc. 1). In its motion to dismiss, defendants argue plaintiff’s claim fails to meet the federal pleading standard because she does not plausibly allege an existing cause of action. (Doc. 15). Specifically, defendants argue plaintiff fails to allege that she personally registered her telephone number with the do-not-call registry, as required by [Section 64.1200\(c\)](#). (*Id.*, at 3, 6–7).

For the following reasons, the Court finds plaintiff fails to state a claim based on the plain language of [Section 64.1200\(c\)](#). Plaintiff’s arguments in support of another interpretation are unavailing. Further, the Court declines plaintiff’s request to amend her complaint.

##### A. Plain Language

“Congress enacted the TCPA to protect consumers from the ‘proliferation of intrusive [telemarketing] calls to their homes.’” *Golan v. Veritas Entm’t, LLC*, 788 F.3d 814, 819

(8th Cir. 2015) (alteration in original) (quoting *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 372 (2012)). The key provision of the TCPA applicable to this case is [Section 227\(c\)\(5\)](#).

[Section 227\(c\)\(5\)](#) provides, in pertinent part, a private right of action to “[a] person who has received more than one telephone call<sup>1</sup> within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under [[Section 227\(c\)](#)].” [Section 227\(c\)](#) requires rulemaking and regulations based on that rulemaking “concerning the need to protect residential telephone subscribers’ privacy rights to avoid receiving telephone solicitations to which they object.” [Section 64.1200\(c\)](#) is one such regulation. [Section 64.1200\(c\)](#) prohibits all telephone solicitations to “[a] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry[.]” Thus, [Section 227\(c\)](#) provides a private action based on the circumstances in [Section 64.1200\(c\)](#).

The plain language of [Section 64.1200\(c\)](#) indicates that [Section 227\(c\)\(5\)](#)’s private action exists only for a residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry. “[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.” *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). “If the statute itself does not display an intent to create a private remedy, then a cause of action does not exist.” *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017) (internal quotations omitted). [Section 227\(c\)\(5\)](#) only displays an intent to create a private remedy where its promulgated regulations so provide. [Section 64.1200\(c\)](#) was promulgated under [Section 227\(c\)\(5\)](#). But [Section 64.1200\(c\)](#) does not include a private remedy for a residential telephone subscriber who has not registered his or her telephone number on the national do-not-call registry. The regulation’s plain language provides no distinction for a telephone number that had previously been registered on the national do-not-call registry by someone else.

When “the words of a statute are unambiguous, the judicial inquiry is complete.” *Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020) (cleaned up); see *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 823 (8th Cir. 2009) (discussing regulations). As discussed, the plain language of [Section 64.1200\(c\)](#) states that a violation occurs only when a person or entity initiates a telephone solicitation to a residential telephone subscriber who has registered his or her telephone number on the

national do-not-call registry. The Court finds no ambiguity in this language. Thus, the Court limits its interpretation to the plain language of [Section 64.1200\(c\)](#).<sup>2</sup>

\*3 Here, plaintiff alleges that “[s]ince April 7, 2017, [her] telephone number (319) XXX-3342 has been registered with the DNC Registry.” (Doc. 1, at 4). Plaintiff does not allege, either directly or indirectly, that *she* registered her telephone on the do-not-call registry. Although plaintiff alleges defendants violated [Section 64.1200\(c\)](#), thereby entitling her to recovery under [Section 227\(c\)\(5\)](#), she does not allege that she registered her telephone number on the do-not-call-registry.<sup>3</sup> Further, [Section 227\(c\)\(5\)](#) does not display an intent to create a private remedy as plaintiff alleges it. *Ziglar*, 137 S. Ct. at 1856. Thus, plaintiff fails to state a claim that defendants violated [Section 64.1200\(c\)](#), as her complaint alleges.<sup>4</sup> See *Iqbal*, 556 U.S. at 678; *Whitney*, 700 F.3d at 1129.

### B. Plaintiff's Arguments

Plaintiff argues that other statutory language and policy consideration show that dismissal of her claim is inappropriate despite [Section 64.1200\(c\)](#)'s plain language. The Court is not persuaded by these arguments.

Plaintiff argues she can properly state a claim under [Section 64.1200\(c\)](#) because [Section 227\(c\)\(5\)](#) allows “a person,” not just a “subscriber,” to bring a claim. (Doc. 18, at 9–10). There are two problems with this argument. First, although plaintiff alleges defendants violated [Section 227\(c\)\(5\)](#) based on [Section 64.1200\(c\)](#), (Doc. 1, at 11), for the reasons discussed, plaintiff fails to sufficiently allege a [Section 64.1200\(c\)](#) violation. [Section 227\(c\)\(5\)](#)'s terminology does not change this. Second, even if [Section 64.1200\(c\)](#) did allow for plaintiff to bring a claim on someone else's behalf, plaintiff fails to allege that she does so here. Plaintiff alleges that defendants called her telephone number attempting to reach “Kevin” and she alleges that her telephone number was registered to the do-not-call registry, (Doc. 1, at 4–5), but she does not allege that Kevin registered the telephone number such that defendants' calls could be viewed as “initiat[ing] ... telephone solicitation to” a residential telephone subscriber who has registered his or her telephone number with the do-not-call registry, as required by [Section 64.1200\(c\)](#).

\*4 Plaintiff's corresponding analogy to the court's analysis of the Federal Trade Commission's Telemarketing Sales Rule (“TSR”) in *United States v. Dish Network, LLC*, 75 F. Supp.

3d 916 (C.D. Ill. 2014), is likewise unavailing. Plaintiff argues that because the *Dish Network* court found “[t]he TSR does not say the call must be initiated to the person who registered the number on the [do-not-call] Registry,” the Court should similarly interpret [Section 64.1200\(c\)](#). (Doc. 18, at 10–11). But “the TSR states that it is a violation of that rule to initiate ‘any outbound telephone call to a person’ when ‘[t]hat person's telephone number is on [the Registry].’ ” *Dish Network*, 75 F. Supp. 3d at 935 (citing 16 C.F.R. § 310.4(b)(1)(iii)(B)). Here, plaintiff alleges a [Section 64.1200\(c\)](#) violation, not a TSR violation. (Doc. 1). And unlike the TSR, [Section 64.1200\(c\)](#) expressly limits its violation to telephone solicitations made to “[a] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry.” Thus, [Section 64.1200\(c\)](#) plainly requires that the call to be initiated to the person who registered the number on the registry—even if the TSR does not.

Plaintiff also argues policy considerations should prevent the Court from dismissing her claim. Plaintiff first argues that re-registration of a telephone number on the do-not-call registry is impossible. (Doc. 18, at 19–21). Although the do-not-call registry website is confusing, plaintiff herself demonstrates that she was able to register her telephone number. (*Id.*, at 20 n.4). She states that when she attempted to register “[f]or the sake of example,” she nevertheless received a confirmation email thanking her for registering her telephone number. (*Id.*). Though the date of registration did not update from her telephone number's earlier registration, which seemingly occurred while it was assigned to someone else, she nevertheless *could* register, according to the website and its confirmation. (*See id.*). Second, website registration is not the only way a subscriber can register for the do-not-call registry; a subscriber can call a toll-free number. See *National Do Not Call Registry FAQs*, FTC, <https://consumer.ftc.gov/articles/national-do-not-call-registry-faqs> (last visited June 9, 2022). There, registration of an already registered telephone number results in a confirmation with no mention of the previous registration date. Third, the FTC website and phone registration emphasize the need for “you” to register “your new number” when obtaining a new telephone number. See *National Do Not Call Registry*, FTC, <https://www.donotcall.gov/register.html> (last visited June 9, 2022). The website registration is less clear, though it includes the modifier “your” in both verification and registration. This language, coupled with the actual ability to re-register the same telephone number via both the website and toll-free number, suggests that a subscriber can register a

telephone number that was already registered. Further, the do-not-call registry statute provides that reassigned numbers will be periodically taken off the list, suggesting that a telephone subscriber who finds their telephone number already registered cannot rely on that previous registration for protection. 15 U.S.C. § 6155. In sum, the Court does not find plaintiff's policy arguments based on re-registration availing.

Plaintiff then argues the Court should liberally construe Section 64.1200(c) because the TCPA is a remedial statute. (Doc. 18, at 21–22). A court cannot liberally construe a statute when it finds the plain language is unambiguous and therefore does not engage in statutory construction. See *Brown v. J.B. Hunt Transport Servs., Inc.*, 586 F.3d 1079, 1086 (8th Cir. 2009); *Babb*, 140 S. Ct. at 1177. Here, because the Court has found the regulation's plain language unambiguous, the Court does not engage in statutory construction. Thus, the Court declines to follow plaintiff's policy argument based on liberal construction.

\*5 In sum, despite plaintiff's arguments to the contrary, she fails to state a claim that defendants violated Section 64.1200(c).

### C. Amendment

Alternatively, plaintiff requests that the Court permit her to amend her complaint to add adequate facts. (Doc. 18, at 24). The Court declines plaintiff's request for several reasons. First, plaintiff's request does not comply with Local Rules because she failed to attach her proposed amended complaint. See LR 15. Second, plaintiff had the right to amend her complaint as a matter of course within “21 days after service of a motion under Rule 12(b)” —that is, a motion to dismiss. See FED. R. CIV. P. 15; FED. R. CIV. P. 12. Here, defendants filed their motion to dismiss on April 15, 2022, and plaintiff was served on that date. (Doc. 15). This means plaintiff could have amended her Complaint through May 6, 2022, without the Court's permission. See FED. R. CIV. P. 6. But plaintiff did not.

Finally, although the Court could find that justice requires that the Court allow plaintiff to amend her complaint, See FED.

R. CIV. P. 15, it does not find that justice requires amendment here. This Court has allowed amendment of a complaint when “dismissal of the plaintiff's present pleadings is appropriate,” but there is “no reason to believe that the plaintiff[ ] cannot adequately plead, as opposed to have not adequately pleaded, a factual basis for [her claim].” *Moller v. Tyson Foods, Inc.*, No. C 14-4056-MWB, 2014 WL 4437548, at \*4 (N.D. Iowa Sept. 9, 2014). When arguing for amendment, plaintiff states “if necessary, Plaintiff can amend her complaint to allege that she is the subscriber” to her telephone number. (Doc. 18, at 24). But the issue here is not whether plaintiff is a subscriber. The issue is whether she was the subscriber who registered her telephone number with the do-not-call registry, such that she can state a claim that defendants violated Section 64.1200(c) when they called her. Further, even if plaintiff means to say that she is a subscriber who registered, it appears plaintiff only registered her telephone number with the do-not-call registry as “for the sake of example” in her argument, and had not registered at the time defendants called her. (See *id.*, at 20 n.4). As such, the Court has reason to believe plaintiff cannot adequately plead, as opposed to has not adequately pleaded, a factual basis for her claim. See *Moller*, 2014 WL 4437548, at \*4. Thus, the Court declines plaintiff's request to amend her complaint.

For these reasons, the Court grants defendants' motion.<sup>5</sup>

### V. CONCLUSION

For these reasons, defendants' motion to dismiss (Doc. 15) is **granted**. This case is **dismissed with prejudice**. The Clerk of Court is directed to **enter judgment** in favor of defendants and against plaintiff.

**IT IS SO ORDERED** this 9th day of June, 2022.

### All Citations

Not Reported in Fed. Supp., 2022 WL 2713278

### Footnotes

- 1 It is undisputed that a text message is a call under the TCPA.
- 2 Accordingly, the Court does not consider the parties' arguments relating to extratextual sources. (Docs. 18, at 22–23; 20, at 4–5).
- 3 In Count I of her complaint, plaintiff alleges that defendants violated [Section 64.1200\(c\)](#) “by initiating, or causing to be initiated, telephone solicitations to telephone subscribers such as Plaintiff and the class members who registered their respective residential telephone numbers with the [do-not-call] Registry[.]” (Doc. 1, at 11). But in her factual allegations and her briefing, plaintiff does not state that *she* registered her telephone number with the do-not-call registry. (See Doc. 1, at 4 (“Since April 7, 2017, [plaintiff’s telephone number] has been registered with the [do-not-call] Registry.”)). Further, plaintiff argues whether she or someone else registered the number with the do-not-call registry is of no consequence. (See *generally* Doc. 18). The Court disagrees.  
  
Plaintiff also argues other courts have found allegations like hers sufficient to state a claim under the TCPA in motions to dismiss, motions for default judgment, and bench trials. (Doc. 18, at 11–19). Plaintiff notes that defendants do not “reference a single decision adopting their argument.” (*Id.* at 5). The decisions that plaintiff cites, however, are from district courts, meaning they are non-binding on this Court. Further, these decisions are from district courts outside the Eighth Circuit Court of Appeals, which detracts from them even being persuasive. For the reasons discussed in this order, the Court declines to follow these courts.
- 4 That [Section 64.1200\(c\)](#) requires “such do-not-call registrations must be honored indefinitely,” makes no difference here because this language appears in the context of the violation the Court has found plaintiff does not adequately allege. (See Doc. 20, at 4).
- 5 Thus, the Court does not reach the parties' arguments about plaintiff's proposed class. (Docs. 15-1, at 3 n.4; 18, at 7 n.1).